CASES

ARGUED AND DETERMINED IN THE

SUPREME COURT OF LOUISIANA,

AT

MONROE,

IN

JUNE, 1884.

JUDGES OF THE COURT:

HON. EDWARD BERMUDEZ, *Chief Justice.*

Hon. FÉLIX P. POCHÉ,
Hon. ROBERT B. TODD,*
Hon. THOMAS C. MANNING,
Hon. CHARLES E. FENNER,
} *Associate Justices.*

No. 1111.

S. MEYER vs. W. W. FARMER.

The right to amend pleadings is not reducible to inflexible rules. It must be determined in the exercise of a sound legal discretion. Amendments should always be allowed for the promotion of justice, where they cause no injury, provided time may be asked and allowed to a party pleading and showing surprise.

A supplemental answer which simply amplifies a general denial by enumerating the reasons for which plaintiff should not recover, and does not change the original relief asked, can be allowed to be filed shortly before trial and the case will be proceeded with when no motion for a continuance, for time to prepare, is made.

Exceptions to the admission of an act of sale in a case wherein recovery of the price is claimed by a purchaser, in consequence of his eviction from the property sold him cannot avail. The act is the fundamental fact on which the litigation rests. Exceptions to the refusal of the judge to admit cumulative testimony and to the reception of irrelevant proof need not be passed upon.

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* Mr. Justice TODD was absent during the whole of this term.

Meyer vs. Farmer.

A purchaser who buys property adjudicated to a succession representative at a judicial or forced sale of the same, in furtherance of an agreement between them that he will not bid thereon against him, and whose purchase is subsequently annulled in consequence of such reprobated combination, must be considered and dealt with as a buyer who purchases with knowledge of the danger of eviction and at his peril and risk. Under such circumstances he cannot, after eviction, repete the price paid.

No case can be found where, money having been paid by one of the parties to the other upon an illegal contract, both being *participes criminis*, an action has been maintained to recover it back.

APPEAL from the Fifth District Court, Parish of Ouachita. *Richardson*, J.

R. Richardson and *M. J. Liddell* for Plaintiff and Appellee.

Talbot Stillman for Defendant and Appellant.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an action to recover the price of property sold by defendant to plaintiff and from which the latter was judicially evicted.

The defense was: *first*, a general denial, and *next*, a specification or enumeration of the grounds for which plaintiff should not recover.

The case was tried by a jury who found for plaintiff. Judgment having been accordingly entered, the executor of the defendant, who died since suit, has taken this appeal.

The record contains *four* bills of exception. *One* by plaintiff to the ruling of the district judge allowing the supplemental answer to be filed, and *three* by defendant; the *first* to the admission of the act of sale, the *second*, to the refusal of the court to allow the introduction of the testimony of the defendant in another case; the *third*, to the refusal of the judge to permit him to contradict plaintiff, whom he had made his witness, by plaintiff's own testimony in a different suit against him.

The objections urged to the filing of the supplemental answer, are: *that* it changed the previous issues and raised new ones, entirely inconsistent with those originally formed, and *that* the amendment came too late.

The substantive allegations of the petition are: that plaintiff bought property of defendant, for a paid price; that he was subsequently evicted by judgment of court and that he is entitled to recover the price.

The pith of the general denial is a protest against the liability charged. Such a defense leaves the burden of complete proof on the

plaintiff, but does not justify special defenses implying a pre-existing but extinguished obligation and which should be expressly set up.

A petition may be amended, *provided*, the amendment does not alter the substance of the demand, that is: the prayer, by making it different from that originally formed.

An answer can likewise be amended, subject to the same rule. The defendant may even add peremptory exceptions to it. C. P. 419, 420.

Amendments are reducible to no unbending rule. Each case must be left to the sound discretion of the court. They should always be permitted where they tend to the furtherance of justice and cause no injury, without prejudice to the right of the other party, who may plead and show surprise, to ask time to prepare himself. H. D. 1182 (9) C. P. 421; L. D. 554 (1).

The amended answer, complained of in this case, does not alter the prayer of the original one. It contains no allegations antagonistical to the previous defense, shaped into a general denial. It elaborately enumerates the reasons for which the defendant cannot be held liable. It sets up facts and legal deductions therefrom, likely to have arisen, after proof by plaintiff of his allegations. It is practically nothing more than a peremptory exception filed after the closing of the evidence, which is permissible at any stage of the proceedings.

It does not appear that the plaintiff has pleaded surprise, asked time and was refused the same. We cannot say that the district judge erred in allowing it to be filed.

We deem it unnecessary to consider the bills of exception of defendant, as the admitted evidence cannot prejudice him and the rejected testimony is cumulative and actually superfluous.

The facts, indisputably established, are:

S. Meyer purchased from W. W. Farmer, for $4500, paid, a piece of property known as the King place, in Monroe, adjudicated to him with other real estate for $7383 33, under executory proceedings by a mortgage creditor, against the succession of Morrison, of which he, Farmer, was to Meyer's knowledge, the administrator. The purchase was made in furtherance of an understanding between them, previous to the crying, that Meyer, who intended bidding on that property, would not do so, against Farmer, who also proposed and was anxious to buy it; that after the adjudication to Farmer he would sell it to Meyer, for the price agreed. The entire property, inventoried at $12,000, was adjudicated in block, including the King place, to Farmer for $7383 33, that being the two-thirds of the appraisement. There was no other bid

besides Farmer's. Meyer had absented himself from the place of sale on the occasion.

Farmer was subsequently removed as administrator and suit was instituted by his successor, both against him and against Meyer, for the nullity of the adjudication to him and of the sale by him to his vendee. The litigation ended by final judgment annulling the two transactions complained of and the two pieces of property reverted to the succession.

The reasons assigned in the suit against Farmer expressly form part of the opinion in that against Meyer, the facts being identical, or nearly so, in both controversies.

In the opinions which we delivered at the time (34 A. 1020 and 1031), we emphatically stigmatized the two transactions as offensive and prohibited by law. In the case of Chaffe vs. Meyer, this very defendant, it was said: "If the sale to Farmer was a nullity, the sale by him to Meyer who was aware of all the circumstances of the same and a party thereto, is likewise a nullity." We adduced authorities establishing the proposition, that, agreements whereby parties combine not to bid against each other, at public auction, especially in cases where such auctions are required by law—are void—for they are unconscientious, against public policy and have a tendency to injuriously affect the character of such sales, to mislead private confidence and operate, virtually, as a fraud upon the sale.

From that state of facts and this appreciation of the law applicable thereto, it is manifest that the contract, one of the elements of which is sought to be enforced in this case, was palpably immoral and such as courts of justice cannot enforce without desecrating their lofty mission.

It is also apparent that, as no one can claim ignorance of the law and is bound to know it at his risk, Meyer *knew* that his previous understanding with Farmer, who was the administrator of the succession of Morrison, and the subsequent execution of it, culminating into the sale and purchase, was reprobated, because against good morals and public policy. He cannot, therefore, be listened to say, in the present suit, that the particular act in question has been proved not to be fraudulent or not contrary to public good, R. C. C. 19, as the law transgressed by him was enacted to prevent fraud, or for some other motive of public order or interest, declared the act void. He further knew that the adjudication to Farmer was one susceptible of annulment on that ground. He, nevertheless, purchased from Farmer and paid the price.

Under those circumstances can he, as an evicted purchaser, claim the return of the price?

The law, it is true, is positive that even in case of stipulation of no warranty, the seller, in case of eviction of the purchaser, is liable to a restitution of the price; but after laying this rule down as a general principle, it formally announces the exception, that this shall not be the case, where the buyer, at the time of sale, was aware of the danger of eviction and purchased at his peril and risk. R. C. C. 2505.

In the application of this law this Court has frequently announced that where the vendee was aware of the defects of his title, and therefore purchased at all hazards, he was entitled to no claim by reason of eviction. 5 R. 76; 3 A. 326; 5 A. 314, 491, 667, 683; 6 A. 297; 21 A. 248, 721; 6 L. 550; 3 R. 434; 4 A. 321; 18 A. 232.

This article of our Code is borrowed from the Napoleon Code. C. N. 1629; and derives, on principle, from the Roman law.

While commenting upon it, the French writers say:

"La connaissance dont parle notre article n'est pas seulement celle que le vendeur a donnée expressément du danger de la chose, mais celle que l'acheteur pouvait avoir au moment du contrat par quelque moyen que ce soit." V. Dalloz, garantie No. 125; Troplong, Vente, 484.

"Celui qui achète, à ses risques et périls, soit qu'il le déclare en termes exprès, soit que son intention se révèle par des expressions analogues, n'a pas le droit de réclamer le prix par lui payé; car ce prix n'est pas précisement la représentation de la chose qui lui est transmise. Il est l'équivalent des prétentions, des chances qui lui sont offertes." Duvergier, Vente No. 339; Favard, Vo. Vendeur, sec. 2, § 1, No. 5.

In proper cases the law affords a *locus penitentiæ* to the *particeps criminis* and allows him to plead as was done in this case, that a contract into which he has voluntarily formed is *contra bonos mores*. The authorities make an exception to the general rule: *nemo allegans tur pitudinem suam audiendus*, which is founded upon the necessity of the case and the paramount interest of the public. Gil vs. Williams, 12 A. 221.

In cases of that description, this Court has distinctly announced that the law whose mission is to right the innocent and to enforce the performance of licit obligations only, leaves parties who traffic in forbidden things and then break faith, to such mutual redress as their own standard of honor may award. Boatner vs. Yarsborough, 12 A. 250.

It was also said, more than once, that courts of justice will not aid parties in the enforcement of the effects of contracts made in violation

of law. 12 A. 167; 1 A. 178; 19 A. 332; also, 3 M. N. S. 48; 17 L. 120; 7 Wall, 548, Cappel's case; 11 Wheaton, 258, Armstrong's case; 4 Peters, 189, Bartles' case; 68 N. Y. 558; 57 N. Y. 518, (533).

Eighty years and more ago, Lord Kenyon, in the Court of King's Bench, emphatically said:

"No case can be found where, when money has been paid by one of two parties, to the other, upon an illegal contract, both being *participes criminis*, an action has been maintained to recover it back." Houson vs. Hancock, 8 T. R. 575.

Under the weight of those conservative expositions of the law, we cannot conceive how it is possible for us to allow the plaintiff the relief which he seeks.

The jury who rendered a verdict in his favor took rather a business than a legal view of the nature of his demand and the district judge who rendered judgment on their finding, no doubt thought it was preferable to do so, as the case was to be taken up for review on appeal.

It is, therefore, ordered and decreed that the verdict of the jury be set aside and the judgment upon it avoided, annulled and reversed, and it is now ordered, adjudged and decreed that there be judgment in favor of the defendant or his succession, rejecting plaintiff's demand, with costs in both courts.

No. 1112.

ORR & LINDSLEY VS. WILLIAM HAMILTON.

Article 2203 of the Civil Code, which provides that "the remission or conventional discharge in favor of one of the co-debtors *in solido* discharges all the others," applies to obligations *ex delicto* as well as to contract obligations.

Parol testimony is inadmissible to prove a compromise, which must be reduced to writing. But a judgment of a competent court of record predicated on a compromise and a resulting consent between the parties, is admissible in proof of a compromise.

APPEAL from the Fifth District Court, Parish of Ouachita. *Richardson*, J.

Talbot Stillman for Plaintiff and Appellees.

Boatner & Boatner for Defendant and Appellant.

The opinion of the Court was delivered by

POCHÉ, J. In a suit on a promissory note of the sum of four hundred and twelve dollars, plaintiff sued on an attachment of defendant's

property, consisting of goods, wares and merchandise, on the alleged ground of the debtor's intention to dispose of the same in fraud of his creditors.

On motion of the defendant, the writ of attachment was dissolved as having been wrongfully obtained. That judgment having been affirmed by the Court of Appeal, is now final.

In his answer the defendant pleaded in reconvention damages in the sum of five thousand five hundred dollars, alleged to have been caused by the illegal attachment of his property, and he has taken this appeal from the verdict of a jury allowing him only one hundred dollars as damages, which he finds insufficient. Plaintiffs pray for an amendment of the judgment rejecting entirely the claim for damages.

To the demand in reconvention, plaintiffs first pleaded a peremptory exception urging in substance that simultaneously with their attachment several similar proceedings had been instituted by other creditors of the defendant, whose property was seized under these several writs, in consequence of which all the attaching creditors became responsible *in solido* for all damages suffered by the defendant. They then aver that by subsequently entering into a compromise with several of the seizing creditors, and granting them a conventional discharge, the defendant had lost all recourse on any of the other co-debtors as alleged tort-feasers. Their exception was overruled; but it was well taken and it should have prevailed.

Defendant contends that the provisions of article 2203, Civil Code which declare that the remission or conventional discharge in favor of one of the co-debtors *in solido* discharges all the others, does not apply to obligations arising *ex delicto*, but only to contract obligations.

The plain and unambiguous language of the Code does not warrant the distinction invoked, which is practically a distinction without a difference. Each wrong-doer is responsible for the full amount of the damages suffered; and any amount paid by one of them on the score of damages in discharge of the legal obligation resulting from the tortious acts of several wrong-doers, must operate the discharge of all of them, unless the party injured has expressly reserved his right against the latter.

Such is the construction placed on the article by this Court in the case of Owen vs. Brown, 13 Ann. 201. That was an action for damages for an alleged wrong, and the defense was the discharge of the defendant by reason of a compromise between plaintiff and one of the alleged wrong-doers. The defense prevailed, the court holding that "a

settlement with, and an unconditional discharge of, one of the tort-feasers has discharged the other."

The next contention of the defendant is, that parol testimony was inadmissible to prove a compromise, and his bill of exception to the judge's ruling on that point was well taken.

But discarding all such evidence, we find in the record judgments rendered in the several cases, which furnish ample and the highest kind of evidence of the compromise entered into between the defendant and several of his wrong-doers.

These judgments recite in substance that the parties have compromised their respective claims, and by reason of their consent the creditors recover judgment on their demands, and the defendant recovers a stated amount on his reconventional demand for damages.

This Court must presume that the district judge had legal proof of the compromise which made the basis of his judgment; and besides, the admission of both parties in open court of the existence of a lawful compromise would estop them from denying that the contract had been reduced to writing as the law requires.

Defendant's last point, touching his alleged reservation of his rights against plaintiff is not supported by the record. The evidence on that point consists mainly of loose statements of his attorneys that they intended "to fight Orr & Lindsley," and of their own construction of the meaning and purport of the language used. Irwin vs. Scribner, 15 Ann, 583.

It is therefore ordered that the judgment of the lower court and verdict of the jury on the reconventional demand be set aside and annulled. It is now ordered that defendant's reconventional demand be rejected at his costs in both courts.

Judgment reversed.

No. 1113.

EMILY FILHIOL VS. R. G. COBB.

It is not vicious pleading where two demands are coupled, not inconsistent nor contrary and where one does not exclude the other, as where there is an express warranty of title with stipulations that in case of eviction the vendor will return the purchase price and reimburse the cost of improvements, or will reimburse the vendee such sum as he may pay to avoid dispossession.

In such case, where there has not been an actual eviction but a purchase of the superior title, the vendee will recover the sum paid for such title to avoid dispossession.

Filhiol vs. Cobb.

APPEAL from the Fifth District Court, Parish of Ouachita. *Richardson*, J.

Talbot Stillman for Plaintiff and Appellee.

R. G. Cobb in pro. per.

The opinion of the Court was delivered by

MANNING, J. The plaintiff acquired from the defendant through a mesne conveyance a tract of land below the town of Monroe of 142 acres, from which she was evicted or was about to be evicted, when she bought a title from the party who was about to dispossess her. She prays judgment in the alternative, either that she recover the price paid by her to her vendor and the cost of improvements put by her on the land, or the sum paid by her to avoid eviction to the party who was about to dispossess her.

The defendant moved that the plaintiff be compelled to elect, and the judge refused the motion.

There is no inconsistency in the two demands. Neither excludes the other, nor is one contrary to the other. Cross v. Richardson, 2 Mart. N. S. 323; Montross v. Hillman, 11 Rob. 87. The cause of action is eviction from land, the title to which was warranted, and the prayer is for payment for one or the other of the resulting consequences.

The plaintiff bought from the vendee of the defendant with subrogation to all his rights. The defendant's deed to that vendee, after warranting against all claims, mortgages, and incumbrances whatsoever in order to secure him against eviction and against all losses and expenditures he may suffer, or find it necessary to make in order to avoid eviction by any adverse title or mortgage, specially mortgaged to him another tract of land, to secure to the vendee or his assigns the return of the purchase price and the value of the improvements existing at the time of the eviction. Then follows a separate stipulation, if the vendee or his assigns shall be required to pay any sum to prevent being dispossessed, such sum shall be refunded to him with interest.

The plain meaning of these stipulations is, if Cobb's vendee, or any subsequent purchaser who has been subrogated to that vendee's rights, shall be evicted from the land and lose it altogether, Cobb will refund him the purchase price and the cost of improvements, but if he shall not lose the land altogether but retain it by paying a sum to avoid dispossession, then Cobb will refund that sum with interest.

The subsequent history of the land was, it was sold under foreclosure of the Citizens' Bank mortgage and bought by the Bank. Mrs. Filhiol was permitted to remain on the place and nothing she had was disturbed. A custodian was put on the plantation—this land of Mrs. Filhiol being a part of a large plantation once owned by Powers, and the whole plantation having been acquired by the Bank under its foreclosure—the putting the custodian there being evidently intended to denote a formal taking possession by the Bank. It is true that such an act constitutes a technical eviction of the former possessor, for actual dispossession is not essential to constitute eviction, but it is manifest the particularity of Cobb's recitals in his deed was intended to provide for both contingencies, actual eviction and impending dispossession. In the first case, the party evicted was entitled to reimbursement of his purchase price and cost of improvements, in other words to reimbursement of what he had lost. In the second, he was entitled to be refunded what he should pay to avoid dispossession, and that is the smaller sum for which judgment is prayed, and which alone can be recovered.

Mrs. Filhiol has not yet paid all of this sum, having arranged with the Bank to pay by instalments. The sum agreed on is $1420 and Cobb's stipulation was to pay eight per cent. interest. May 22, 1883 is the date from which interest runs.

A call in warranty upon F. P. Stubbs was made by the defendant which was answered. No disposition is made of it. The judgment does not affect it, and we have not considered it. The plaintiff should not be delayed, and it would seem the defendant's rights therein should be reserved, for which we shall provide.

It is therefore ordered and decreed that the judgment of the lower court is amended by inserting in lieu of the sum therein stated, fourteen hundred and twenty dollars with eight per centum per annum interest from May 22, 1883, and that the rights of the defendant against F. P. Stubbs are reserved, and as thus amended that it is affirmed, the plaintiff and appellee to pay costs of appeal.

ON APPLICATION FOR REHEARING.

The plaintiff calls attention to the omission to include in our decree the attorney's fees which were secured by Cobb's special mortgage, and which were fixed at ten per centum upon the amount his vendee had to pay, and must therefore be computed upon the judgment we have

rendered for the reimbursement of that amount. We shall amend accordingly.

The defendant points out that our decree does not conform to the terms of payment and rate of interest obtained by Mrs. Filhiol from the Bank. If the Bank has granted her time and a reduced rate of interest, that does not alter or affect his stipulation, which we have enforced.

The rehearing prayed by the defendant is refused, and that prayed by the plaintiff need not be granted for the purpose of amending. Proceeding to amend, it is ordered and adjudged that the former decree is amended by inserting therein that the plaintiff have and recover one hundred and forty two dollars of the defendant as attorney's fees, and as thus amended that it be and remain the judgment of this court.

Rehearing refused.

No. 1110.

S. Meyer vs. F. P. Stubbs.

When a suspensive appeal had been perfected in a case then appealable, before the promulgation of the constitutional amendment, our jurisdiction thereof vested, although the return-day and actual filing of the transcript did not occur till after such promulgation. The case stands on the same footing with appeals of the same character which had been filed prior to the promulgation, and the transfer thereof to the Circuit Court will be granted.

APPEAL from the Fifth District Court, Parish of Ouachita. *Richardson*, J.

Richardson & Liddell for Plaintiff and Appellee.

F. P. Stubbs for Defendant and Appellant.

The opinion of the Court was delivered by

Fenner, J. The amount in dispute in this case does not exceed two thousand dollars exclusive of interest. Our appellate jurisdiction over it, therefore, ceased with the promulgation of the recent constitutional amendments.

The only point in which it differs from the case of Walmsley vs. Nichols, just decided, is that the transcript of the appeal had not yet been lodged in this court until after the promulgation. It is a difference without a distinction.

The appeal had been taken and perfected long prior to the promulgation, and was made returnable, according to law, to this court at its present term.

It is elementary that our jurisdiction over the cause attached as soon as the appeal was perfected, and continued in full vigor as if the transcript had been filed, until divested by the promulgation of the constitutional amendment.

The filing of the transcript was a mere act of obedience to the order granting the appeal and to the law.

It was necessary for the appellant to pursue this course, in order to preserve the effect of his suspensive appeal.

We act upon the case as we find it at the moment when we are called upon to act. Our jurisdiction had attached prior to the promulgation of the amendment. That jurisdiction has been taken from us and vested in the Circuit Court. The transcript is lawfully in our records. All we have to do is to make the necessary order to enable the appeal to pass to determination in due course of law by the tribunal to whose jurisdiction it has been transferred.

It is, therefore, ordered that this appeal and the transcript and record thereof be, and the same is, hereby transferred to the honorable the Circuit Court of Appeals for the Second Circuit, sitting in the parish of Ouachita, and that the clerk of this court be authorized to execute this order.

No. 1116.

MRS. L. C. BRACEY ET AL. VS. MRS. M. M. CALDERWOOD ET AL.

Non-residents of the State cannot be legally represented by a curator *ad hoc* in a persona action against them, unless property of theirs has been subjected to the process of the court or actual service has been made upon them. The appointment of a curator *ad hoc* to them in such a case is unavailing.

Judgment cannot be rendered against a party who is not mentioned in the proceeding and who has not joined issue or made himself party. A mere citation served on such party does not compel appearance or justify judgment in default.

Defenses not justified by the answer and made in oral or printed argument, do not constitute issues and are not entitled to be passed upon.

One not a party to a proceeding cannot on appeal ask an amendment of a judgment which cannot affect him.

APPEAL from the Fifth District Court, Parish of Ouachita. *Richardson*, J.

F. Garrett for Plaintiffs and Appellees.

R. G. Cobb for Defendants and Appellants.

H. H. Russell for Warrantors, Appellants.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is a suit by an evicted purchaser against the representatives of her author's vendor and warrantor for indemnity.

The defendant called in warranty the authors of her husband, whose universal legatee and executrix she is. Three of these were non-residents, and a curator *ad hoc* was appointed to represent them.

There was judgment for plaintiff against the estate of Calderwood; but the court declined to render judgment against the non-residents.

The defendant and several warrantors have appealed. The former complains of the judgment in two respects only:

1. That it is erroneous in not having been rendered against the non-residents: S. V. Benson, F. B. Cauthorn and H. B. Williams; who, it is claimed, were legally cited by process on the curator *ad hoc*.

2. That the judgment should have been rendered against Mrs. F. C. Downey, an heir of H. M. and T. R. Bry, who it is alleged was cited and failed to appear.

3. The warrantors of defendant, who have appealed, complain of the judgment, saying that the plaintiff cannot claim to have been evicted by the enforcement of a previous mortgage, because she was directed on a personal obligation of hers, incurred by the issuance of a twelve months' bond furnished for the purchase of the property and enforced against her.

4. There is a motion to amend. First, by making the judgment one in favor of Mrs. Downey and the succession of Bry and wife; and second, by allowing the curator a fee of $10 for each of the absentees represented by him.

I.

The suit is not one *in rem*. It is a personal action. The record does not show that the absentees own any property in the State which was subjected to the process of the court; or that any citation was actually served on them; or that they have joined issue in person or by attorney.

In the recently decided case of Laughlin vs. L. and N. O. Ice Company (No. 8956), 36 Ann. we have held that it is now the settled jurisprudence of the Supreme Court of the United States that, except in actions affecting personal *status*, or in those partaking of the nature of proceedings *in rem*, like suits to partition real estate, foreclose mortgages, or enforce privileges or liens, substituted service, as against a non-resident, can be effectual, as "due process of law," under the fourteenth amendment of the Constitution of the United States, only

where, in connection therewith, property in the State is brought under the control of the court and subjected to its disposition, by process adapted to the purpose. The question being federal in its nature, former jurisprudence of this Court must yield to the authority of the highest court in the country.

II.

Defendants' call in warranty does not mention Mrs. Downey's name, or ask that she be cited. She is a married lady. No default was entered against her, and she has not joined issue with or without proper authority. A mere citation served on her could not bring her and her husband into court, did not make them parties, could not force them to answer, and cannot justify any judgment against her. The judgment cannot and does not effect her to any extent.

III.

The answer to defendants' call in warranty does not raise the issue now sought to be formed. The gravamen of the defense is, that if any mortgage existed at the time of sale on the property it was well known to defendant's author; and that in waiving production of the certificate of mortgage, the parties understood that the vendor assumed the responsibility of paying the mortgage.

A reference to the act of sale to Hart, from whom plaintiff inherited the property, shows that it is absolutely reticent on the subject. The inferences of assumption and the deductions, or consequences, alleged to flow therefrom, are ill founded in fact and in law, and therefore unauthorized.

The means of resistance now urged is clearly an afterthought, as it is advanced only in lead pencil, in two short sentences, hastily added, in the margin of the fore last page of the printed brief of counsel, who submitted without oral argument.

Defenses not authorized by the answer and which are made in argument only, form no part of the pleadings. They do not constitute issues and are not entitled to consideration.

IV.

As Mrs. Downey is not a party to the proceeding in warranty, she can neither be dealt with as appellee nor assume that attitude. She has therefore no right by an appearance in this Court to make herself appellee, and as such ask any amendment of the judgment of the lower court which she is authorized to ignore.

V.

The curator *ad hoc* is entitled to the compensation which he claims.

It is therefore ordered and decreed that the judgment appealed from be annulled by allowing T. O. Benton, Esq., curator *ad hoc*, as costs, ten dollars for representing each absentee—that is, thirty dollars in all; and that thus amended, said judgment be affirmed, with costs in both courts.

Judgment affirmed.

No. 1040.

R. M. WALMSLEY & CO. VS. MRS. S. A. NICHOLLS AND HUSBAND.

The amendments to articles 81 and 95 of the Constitution, promulgated on the 15th of May, 1884, did not impair the right of appeal in cases involving more than one thousand, but less than two thousand, dollars, then pending in the Supreme Court.

The legal effect of the amendments was to immediately strip the Supreme Court of jurisdiction of those cases; but the jurisdiction was not thereby destroyed. It was, by the operation of the amendments, transferred to the courts of appeal, with full power to hear and decide said cases.

Hence a motion to dismiss a case of that category cannot prevail in the Supreme Court whence the appeal unimpaired in all its legal effects will be sent to the proper court of appeal.

APPEAL from the Fifth District Court, Parish of Richland. *Richardson*, J.

Talbot Stillman for Plaintiffs and Appellees.

R. G. Cobb for Defendants and Appellants.

The opinion of the Court was delivered by

POCHÉ, J. This case, which involves an amount in dispute of more than one thousand, and less than two thousand dollars, was pending under submission on appeal in this court, when the recent amendment of the Constitution, affecting its jurisdiction, was adopted by the people. Suggesting that we have lost jurisdiction of the cause under the effect of the amendment and the omission of any provision for the transfer of the cause to any other tribunal, appellees move that the case be stricken from our docket and the appeal dismissed. The amendment which restricts our jurisdiction to cases involving an amount exceeding two thousand dollars, is followed by another amendment which vests jurisdiction over cases in which the amount in dispute does not exceed two thousand dollars in the courts of appeal.

The manifest intention of the law-maker in framing the amendments was to divest the Supreme Court of jurisdiction of all cases involving an amount in dispute exceeding one thousand but not two thousand

dollars, and to vest jurisdiction of that class of cases in the courts of appeal. At the moment of the adoption of the amendment, we were stripped of jurisdiction of the class of cases, including those then pending in the court, and we were powerless thereafter to review or decide them. But the right of appeal was not thereby destroyed or annihilated. By the operation of the two amendments that jurisdiction was at once vested in another appellate tribunal, to which such cases were thereby transferred.

When the present constitution went into effect, and the courts of appeal were created and organized, the Supreme Court was stripped of its previous jurisdiction of cases involving amounts in dispute between five hundred and one thousand dollars, which fell thereafter within the jurisdiction of the courts of appeal. In that instrument, provision was made for the immediate transfer of such cases from this court to those tribunals, and thus the appeals were continued by operation of the law in the newly created tribunals.

The recent amendments contain no such provision in terms, but a similar intention is manifest from the two amendments when construed together.

We see nothing in the amendments which could justify even a suspicion that the right of appeal in pending cases of that class was intended to be destroyed. We find, on the contrary, that the intention was clearly to transfer, without restriction or qualification, the jurisdiction of those cases from one tribunal to another.

The omission to provide in terms for the mode of transfer cannot affect the rights of an appellant, as in the case at bar, who has lodged his appeal in the tribunal to which it was returnable at the time that he took it, and to whom no fault can be attributed.

The legal effect of the two amendments together has been practically to remove this appeal from this court to the court of appeals. Nothing of that case now remains in this court but the record or papers, and our plain duty in striking the case from the docket, is to give effect to the substantial meaning of the amendments. To dismiss the appeal as prayed for would wantonly deprive the appellant of a right which he had at the time that he took his appeal—a right which has not been wrested from him, but which, on the contrary, was intended to be maintained and preserved by the very terms of the two amendments in question.

Appellees have called our attention to decisions of this Court and of the Supreme Court of the United States in support of the proposi-

tion that the duty of an appellate tribunal which is divested of jurisdiction of a pending cause is to dismiss the same. But an examination of those decisions shows that they dealt with cases in which the constitutional or legislative provisions which stripped the appellate tribunal of its jurisdiction had not vested that jurisdiction in any other tribunal.

In those cases the previously existing jurisdiction had been effectually destroyed, and the appellees were entitled to the benefit of the judgments rendered in their favor, and which could not be reviewed by any tribunal. Hence, the appellate courts in which the cases were pending had no other alternative but to dismiss the appeals. Meyers vs. Mitchell, 20 Ann. 533; Cushing vs. Hickman & Thompson, 20 Ann. 567; Insurance Company vs. Ritchie, 5 Wal. 541; *Ex parte* McCardle, 7 Wal. 506.

In the present case, the tribunal in which it was pending has been stripped of its jurisdiction, but the right of appeal has not been destroyed; it has, on the contrary, been guardedly preserved and kept alive, and its jurisdiction has been entrusted to a competent appellate tribunal, over which the previous court has a supervisory control. The transfer is as effective as if it had been directed in precise terms in the amendments.

It is therefore ordered that the motion to dismiss this appeal be denied. It is further ordered that this case be stricken from our docket, and that the record of the same be transferred to the Court of Appeals of the Second Circuit, holding sessions in and for the parish of Richland—costs of appeal to abide the final decision of the same.

No. 1109.

R. G. COBB VS. J. E. MCGUIRE, TAX COLLECTOR.

This Court has not jurisdiction of suits wherein the mode of enforcing the payment of taxes is alone in dispute, unless the amount of the taxes claimed is large enough to bring them within our jurisdiction. It is only where the constitutionality or legality of the tax is contested that our jurisdiction attaches without regard to the amount involved.

Where no sum whatever is mentioned in the pleadings in an injunction of a tax sale, and the advertisement makes no mention that the sale is to be for penalties, only the sum stated in the advertisement as the taxes due will be considered in determining jurisdiction.

APPEAL from the Fifth District Court, Parish of Ouachita. *Richardson*, J.

R. G. Cobb for Plaintiff and Appellee.

T. O. Benton for Defendant and Appellant.

The opinion of the Court was delivered by

MANNING, J. This is an injunction restraining the sheriff as tax collector from selling the property of the plaintiff for unpaid taxes. The pleadings nowhere contain any mention of the amount involved, but the assessment of the property and the advertisement of its sale shew that the taxes now in dispute are in amount $1,078.06.

The want of jurisdiction is palpable. We gathered from the oral argument that it was supposed our jurisdiction attached because the collection of a tax was involved. We have jurisdiction when the constitutionality or legality of a tax is the matter in dispute whatever may be its amount. No such question is presented here, but simply whether the tax collector is proceeding legally to enforce the collection of a tax, the constitutionality or legality of which is not disputed. In such case, the amount of the taxes must be sufficient to attract our jurisdiction as in other cases.

It was also stated at bar that the interest and penalties together with the taxes make considerably over two thousand dollars, but we have in vain searched the record to ascertain that the collector was proposing or endeavouring to enforce the payment of the penalties. His advertisement does not announce that he was doing so. On the contrary the terms of sale are that "the property shall be offered first for not less than the total amount of all the *taxes, licenses, interest, expenses and costs* due thereon on the 1st day of January 1880, and the costs of sale under this Act, and after the entire list has been offered, all such property upon which no bids equal to said amounts have been made, shall be again offered without readvertisement for not less than the principal of said taxes together with eight per cent per annum interest from the date when said taxes became due."

There is therefore no notice that the penalties will be exacted, or that the property will be sold to pay them, and if there had been an adjudication at a bid not less than the total amount of all the taxes, licenses, interest, expenses and costs, and the bidder had tendered that sum, how could the sheriff have demanded the penalties in addition, when the bidder was offering to comply with the terms of sale as published?

There is a recital at the close of the advertisement commencing thus: —"On all taxes due prior to 1869 fifty per cent damages and 25 per cent additional per annum from 1869 to January 1, 1876 and eight per cent thereafter." Then follows similar recitals of other damages on taxes for other years, but even these recitals are omitted in the later advertisement, there being two in evidence. There is not in the body of the

advertisement, or terms of sale, or any where else any statement or announcement that these penalties or damages were part of the claim for which the property was to be sold. And without the inclusion of them in that claim, the amount is below the jurisdiction we can now exercise.

It is true the plaintiff in his statement, which supplies the place of the burnt petition, avers that the collector had advertised he would sell for certain penalties, but the fact is that he had not so advertised. And it is also true that the defendant treats the suit as if it involved the penalties, but as parties cannot by consent confer jurisdiction upon us, so they cannot by mistake increase the amount involved so as to confer it. It must be remembered in this connection there is no averment of any amount, mistaken or true. The pleadings, we repeat, are silent upon the amount, no allegation being made even of the amount of the taxes, and we ascertain that amount solely from the assessment and the advertisement, and not only no amount of the penalties is anywhere mentioned, but no announcement that the penalties, if their amount is ascertainable, are demanded or that the property is to be sold for them.

It is rare, if not unprecedented, that neither the petition nor answer in a suit contains any mention of the sum, or of any sum involved. Rarely must resort be had to the evidence to ascertain what sum is in dispute, but to go further and include sums which are not claimed or in proof, would be to supplement defective allegations and defective evidence for the purpose of embracing jurisdiction for which we have no warrant.

We must not be understood as deciding that the penalties, if included, could be considered a part of the capital or principal so as to give us jurisdiction. Upon that matter we hold our opinion absolutely in reserve.

By constitutional amendments recently adopted the appellate jurisdiction of suits that like this involve amounts less than two thousand dollars has been conferred upon the Circuit Courts, and this cause must therefore be removed to that tribunal.

It is ordered that this appeal and the record thereof be transferred to the Court of Appeals for the Second Circuit holding term for the parish of Ouachita.

No. 1106.

REV. L. ENAUT VS. J. E. MCGUIRE AND J. GARRETT, STATE AND CITY TAX COLLECTORS.

Vacant property held in private ownership by the authorities of a church, who had bought it in anticipation of an increase in size and population of the city in order that the church might have room for improvements in case of such increase, and with the intention of erecting thereon a church, school or hospital when needed; in absence of any actual use for such purposes, and of any immediate intention or preparation to construct such buildings, is not a "place of public worship," or a "charitable institution," or "property used for colleges, or other school purposes," within the meaning of article 210 of the Constitution, and is not exempt from taxation.

APPEAL from the Fifth District Court, Parish of Ouachita. *Richardson*, J.

R. Ray for Plaintiff and Appellant.

T. O. Benton fot Defendants and Appellees.

The opinion of the court was delivered by

FENNER, J. Plaintiff, who is parish priest for St. Matthew's Church in Monroe, brings this action to enjoin the collection of State and city taxes on property held for the benefit of the Roman Catholic Church, on the ground that it is exempt from taxation under the provisions of article 207 of the Constitution of 1879.

The property consists of two vacant squares in the city of Monroe which have never been leased or used for any purpose whatever. They were bought in 1874, and, according to the testimony of plaintiff himself, who is the sole witness in the case, "the purchase was made upon my representing to the proper parties that it would be advisable for the church to have some grounds for improvements in case the city should increase. That was the reason of the purchase. They were purchased exclusively for the use of the Catholic Church, and have not been on the market since, and are waiting for the building to be made as soon as possible. It is intended to build a school-house, or church, or hospital, as may be needed on those lots."

This is the sole testimony in the transcript affecting the question.

Article 207 of the Constitution exempts "places of religious worship, all charitable institutions, all buildings and property used exclusively for colleges or other school purposes, etc."

We are not precisely advised whether plaintiff claims that the property here is a "place of religious worship," a "charitable institution," or "property used exclusively for colleges or other school purposes."

Unless it falls, literally or by clear intendment, within one of these categories, there is no warrant for the exemption claimed. Literally, it certainly falls within neither of them. It is not a "place of religious worship;" it is not a "charitable institution;" it is not "used for college or other school purposes." Nor, in any legal sense, is there a dedication of the property to any one of those purposes or to all of them combined. Obviously, it is not yet determined whether a church, or a school, or a hospital shall be established. A mere vague purpose exists at some infinite time to establish one or more of these institutions on the property, as may be needed. Nothing fixes this purpose; nothing prevents the owner from abandoning it at will; nothing opposes his right to convert it into business or residence property, or to sell it to the first advantageous purchaser. Such an ambulatory and purely potestative dedication amounts to nothing.

The plain fact is that the church authorities, impressed in 1874 with the belief that the city of Monroe was destined to increase largely in size and population, thus adding to the value of property and extending the field of operation of the church, with that judicious and far-sighted providence which characterizes them, thought it wise to invest in this property, before the anticipated accretion in value should take place, in order (to use plaintiff's language) that the church might "have some ground for improvements in case the city should increase."

The property has been held for ten years. The anticipated increase of the city has not taken place. The expansion of the church's field and needs has not arisen. The necessity for the "improvements" is not yet upon it. No plan is yet decided upon. No steps are on foot to build church, school or hospital. For aught that appears, the vague and undefined purpose is no nearer fruition to-day than it was ten years ago. *Non constat* that it will ever be carried out. By no stretch of even the most liberal interpretation can property thus owned and situated be brought within the purview of the constitutional provision exempting "places of public worship, charitable institutions and property used for colleges or other school purposes."

Analogy is entirely wanting between this case and those supposititious ones instanced by plaintiff's counsel, such as: property upon which a church, school or hospital is being constructed; or property on which such buildings had existed which had been burned down and while preparations were being made to rebuild; or the new graveyard, waiting for death to bring its tenants. Such cases will be determined when they arise, but upon principles entirely inapplicable here.

Judgment affirmed.

No. 1108.

SCHOOL BOARD OF EAST CARROLL PARISH vs. SCHOOL BOARD OF UNION PARISH.

A school board organized according to law has a right to stand in court to claim from another school board likewise constituted, school funds which should have been paid to it by the State authorities and which were illegally paid out to the latter. A receipt therefor would exonerate the debtor board.

If the funds are not in kind in the possession of such board, but can be traced to property in which they have been invested by such board, the property itself can be recovered in place of the funds which it represents.

An action to recover under such circumstances is not barred by the prescription of five years or less.

APPEAL from the Third District Court, Parish of Union. *Graham*, J.

W. R. Rutland for Plaintiff and Appellant.

A. Barksdale for Defendant and Appellee.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This is an action for the recovery of $4440 93, as illegally paid to and received by the defendants and invested by them in a lot and building, or school house thereon.

The defense by way of exception is: that the plaintiffs have no right of action and, therefore, no standing in court, and that the claim is barred by prescription.

From a judgment sustaining those defences this appeal is taken.

I.

From the averments of the petition, which must be taken for true for the purpose of the exceptions, it appears that the State Treasurer, on warrants of the Auditor, has at different times paid to the defendants various amounts, aggregating $4440 93, as the interest on the free school fund due township 19 north, range 13 east, under Act of Congress of February 15, 1843, and Acts of the Legislature 321 of 1855, and 182 of 1857, on a credit of $13,396 81; that the annual interest on this fund is $833 80, whereof $556 20 has been annually paid to the defendant for eight years, aggregating the sum of $4440 93, while the difference, $277 60, has been annually paid to plaintiffs; that the whole of the interest, $833 80, should have been paid to the plaintiffs, for the reason that township 19 north, range 13 east, is in East Carroll and not in Union parish; that the apportionment and distribution of the

school fund has to be made on that basis; that the defendants, when they drew and received those various amounts, knew that they did not accrue to them and have used the same for the purchase of a lot and the construction thereon of a school house, at a cost of $3712 09; that there remains in the hands of defendants a balance of $672 84.

In order to ascertain whether the plaintiffs have a *right* of action, it is only necessary to inquire whether a payment to them would discharge the defendants.

There can be no doubt, under the averments, that the money was plaintiffs' property in the hands of the State, as *a fiduciary;* that if the money, instead of having been paid to the defendants had been paid to the plaintiffs, the payment would have been a valid one and the State would have been released *pro tanto.*

It is evident that if the defendants were to return the money to the State and the latter was to pay it over to the plaintiffs, both the defendants and the State would be discharged from responsibility as to it.

Now, if instead of paying it in this circuitous mode, the defendants were to pay it to the plaintiffs, there can be no doubt they would likewise cease to be liable for it.

A receipt from plaintiffs would, therefore, exonerate the defendants. This circumstance suffices to give them the right to claim judicially what is due them.

If the allegations of the petition be true, then it follows that the defendants have knowingly and, therefore, wrongfully received funds which did not accrue to them, but which should have been paid over to plaintiffs. Such being the case, the petition itself discloses a *cause* of action and, on proof, the plaintiffs are entitled to recover the money or the property, to which it has been traced, with which it is identified and which represents the fund.

II.

The next defense is that of prescription. This is not a suit in damages for a tort. It is an action to recover, *in integrum,* money or the property representing it, which is in the precarious possession of the defendants in a fiduciary capacity and not as owners, with the averred knowledge that it does not belong to them, but to plaintiffs. The defendants hold as the agents or representatives of the plaintiffs, and if prescription can be pleaded at all, they cannot plead that which was set up, which was: one, two, three and five years.

It is, therefore, ordered and decreed that the judgment appealed from be reversed. It is now ordered and decreed that the exceptions filed

be overruled and that the case be remanded to the lower court for further proceedings according to law, and that defendants pay costs of appeal; the costs of the lower court to abide the final decision of the cause.

No. 1117.

M. L. BRYANT VS. E. S. AUSTIN, EXECUTOR.

The Supreme Court has jurisdiction of an action for the nullity of a judgment of divorce, although no pecuniary amount is in dispute.

A judgment of divorce obtained by one of the spouses against the other, who is absent from the State, will be annulled if the party who has obtained it has used fraud or ill practices.

APPEAL from the Fifth District Court, Parish of Ouachita. *Richardson*, J.

R. Ray, D. C. Morgan and *B. W. Johnson* for Plaintiff and Appellee.

Stubbs & Russell for Executor, Appellant.

C. H. Trousdale for Absent Heirs, Appellant.

MOTION TO DISMISS.

The opinion of the Court was delivered by

POCHÉ, J. Plaintiff brings this suit for the nullity of a judgment of divorce rendered in favor of her husband, since deceased.

As appellee she moves for the dismissal of this appeal on the ground of our want of jurisdiction *ratione materiae.*

Her contention is that the pleadings disclose no pecuniary amount in dispute and that this is not a suit for divorce or separation from bed and board. It cannot be denied that under the terms of the Constitution, this Court has jurisdiction of an appeal from a judgment of divorce. Now, an appeal is one of the modes of revising or reversing a judgment. And an action of nullity is another mode. C. P. Art. 556.

If the Supreme Court has jurisdiction by appeal over an action for divorce, it is difficult to conceive by what process of reasoning the same court could be deprived of jurisdiction over an appeal from an action for the nullity of a judgment on the same cause of action.

We hold that this Court has jurisdiction in the premises, and hence, the motion to dismiss is denied.

ON THE MERITS.

The grounds of nullity urged by plaintiff are substantially that the judgment was obtained by her late husband by fraud and other ill practices.

The record contains a considerable mass of irrelevant testimony, and contains several bills of exception levelled at the admission of a great part of the same.

The undisputed relevant facts of the controversy are as follows:

Plaintiff was married to the late M. M. Bryant, who was then a resident of the parish of Ouachita, Louisiana, in March, 1868, in Camden, Arkansas, the place of her residence.

A short time thereafter the husband returned to Louisiana, leaving his wife in Camden, whence she came to join him in March following. He was a mechanic whose occupation, on different plantations, allowed him little or no opportunity to remain at home. His wife remained with him nine months; at the end of which time, with the consent of her husband, she returned to her former home, with the understanding that she would return to Louisiana as soon as her husband wished it, or as soon as he could provide a suitable home for her.

In May, 1871, at his request, she came back but remained only a few days, as her husband had not yet procured a home, and as he requested that she would go back to Camden and remain there until he could make proper arrangements for their living together. During the time of their separation they corresponded together until September, 1878, when the husband ceased writing.

In November, 1878, he filed his suit for separation against his wife, on the ground of abandonment, which culminated in a final judgment of divorce, in October, 1880.

In his petition he alleged that his wife, who had abandoned the matrimonial domicile, was absent from this State and to the best of his information, she was living in the State of Arkansas.

The proceedings were carried on contradictorily with an attorney appointed by the court to represent the absent wife, and all the requirements of process were complied with. But the wife was not informed of the proceedings, and had no knowledge of the suit or judgment until October, 1882, at the same time that she heard of her husband's death.

The attorney of the absentee, immediately after his appointment, inquired of the husband, Bryant, for the address of his wife, and he was informed that she was somewhere in Arkansas, her precise locality being unknown to Bryant, as he stated. The record shows, to our entire satisfaction, that Bryant knew perfectly well, that his wife was then, as she had always been since 1871, in Camden, where he had married her, and where he had left her in March, 1868, whence she had come

to him in March, 1869, where she returned in December, 1869—where she had remained until 1871, in May, at which time she had come back to this place to live with him; to which place she had returned in obedience to his wish and his advice and to which place he had directed his letters to her until September, 1878, only two months before the institution of his suit for divorce.

With this knowledge he designedly omitted to inform his own attorney of the place where she was sojourning, and for the same purpose he refused to give correct information to the attorney of the absentee. The evidence shows conclusively that his wife had the one great and constant desire to settle down and live with him as his wife.

His letters to her show that in her letters she was constantly and persistently pressing and urging him to make the necessary arrangements to that end—and he would invariably detail numerous reasons for an indefinite postponement of the project of their reunion. Avowedly he had no complaint to make of her conduct or of her character, for he said of her to one or two of his few intimate friends that she was "a nice little woman."

But he evidently regretted his marriage with her, and the study of his life was to devise a plan to forsake and abandon her. His object, in the suit for separation, was to make sure, in his own language, that she would get none of his property.

Our reference to these facts is not with a view to revise the judgment of separation on its merits, but merely to define his animus in practicing the deceit which he used towards the attorney of the absentee.

Had he informed the latter of the exact locality of his wife as he knew full well, the attorney would at once have corresponded with her and his whole plan would thus have been thwarted and defeated. We do not mean to exonerate the attorney of his neglect in not continuing his researches for the place where the wife could be reached. But we do hold, under the evidence, that the information given him by Bryant, that his wife was somewhere in Arkansas, he did not know where, was the determining reason of the attorney's supineness in the premises.

Under the textual provisions of our law "a definitive judgment will be annulled in all cases where it appears that it has been obtained through fraud or other ill practices on the part of the party in whose favor it has been rendered." C. P. Art. 607.

Marriage is a contract highly favored by our laws, with which it has been wisely shielded by provisions which cannot warrant or sanction attacks of a fraudulent character on an institution which is the very basis of society and of all well regulated governments.

The dissolution of marriage is not tolerated for trivial causes, and *a fortiori* by offensive and fraudulent practices.

It may be said that these principles are of universal jurisprudence, hence it is that courts have never hesitated to reprobate in unqualified terms and to formally annul all judgments of divorce which have been obtained by means of deceit and fraud. Adams vs. Adams, 51 N. H. 388; Bishop on Marriage and Divorce, sections 697, 699, 700, and authorities therein quoted.

In the case at bar the evidence is conclusive that fraud and deceit were practiced on the court which rendered the judgment, which could not have been obtained without the intentional concealment by the husband of the locality where his wife was then sojourning.

Defendant has pleaded the prescription of one year, but he has apparently abandoned that defense as his counsel have not mentioned it either in the oral argument or in their brief. It is absolutely groundless. The first knowledge of the judgment was obtained by plaintiff in October, 1882, and her present suit was instituted in January following.

Defendant's objection to the letters of Bryant, as evidence, on the ground that they were confidential communications between husband and wife, is met by the consideration that the bonds of matrimony have been severed by the death of Bryant, and by his own theory that they had ceased to be husband and wife since the judgment of divorce had been final. We gave no consideration to the statement of plaintiff touching the contents of lost letters.

An exhaustive consideration of the issues in the case, of the legal evidence in the record, and of the law bearing on the same, has satisfied us that the district judge had done impartial justice between the parties.

Judgment affirmed.

CONCURRING OPINION.

MANNING, J. If five words be omitted from the record of this case, the judgment must inevitably be for the defendant. They are—"he did not know where"—and occur in the testimony of the attorney for the absent wife in the divorce suit. They are the sole foundation in support of the charge of fraud and ill-practice on Bryant's part in that suit. The proceedings in that suit were exceptionally regular and in strict conformity to the requirements of our practice, and I have therefore hesitated before giving my concurrence in the decree of the Court.

The declaration of Bryant, in answer to the question of the attorney appointed to defend his absent wife, from whom he was seeking a

divorce, that he did not know where she was, when he did know, would not be to my mind sufficient of itself, and without any other circumstance, to turn the scale in ordinary suits. But in the interest of public order I recognize that suits for divorce against absent spouses, who have only technical and not actual notice of the existence of the suit, should be confined to the strictest rules, and that the rights of such absent defendants should be jealously guarded.

I therefore concur in the opinion and decree.

No. 1118.

J. E. McGUIRE, TAX COLLECTOR, vs. V. F. VOGH.

Where there is denial of any assessment, or other issue made of the legality of a tax, this Court has jurisdiction.

While suits for the collection of taxes upon property are prohibited, the prohibition does not apply to the collection of licenses which may be prosecuted by rule or motion, as provided in the legislative act, and in other ways.

APPEAL from the Fifth District Court, Parish of Ouachita. *Richardson*, J.

Talbot Stillman and *T. O. Benton* for Plaintiff and Appellee.

Robt. Ray for Defendant and Appellant.

The opinion of the Court was delivered by

MANNING, J. This a proceeding by rule to enforce the payment of a license-tax of fifty dollars upon the defendant's occupation as livery stable keeper, alleged to be due the State.

Exception was made 1. that the Constitution prohibits the bringing of suits for the collection of taxes, and therefore the act of the legislature which authorizes proceeding by rule is unconstitutional and null; 2. that the defendant has not been assessed for this license, and it has not been demanded of him; 3. that it is impossible for him to say or to know what his profits for the year 1884 will be until the year has closed.

The legality of the tax is thus brought in contestation, for if assessment be essential, the want of it would affect the legality of the tax; and as the license is graduated, if its amount depends upon the ascertainment of the profits for that year, the imposition of a license upon profits not realized and therefore not ascertained would be illegal.

The revenue law for licenses requires that for the purpose of calculating the amount of the license, the business of the previous year as also the condition and results of business of the current year shall be

considered, Acts 1880, p. 151, and therefore it is not legally needful to know what are the profits of the current year. As the licenses are collectible on the 2d. of January Ibid. p. 143, and the annual receipts, sales, etc. which are the basis of the licenses and which determine the amount of them, are those of the year for which the license is granted, Ibid. p. 151 sec. 24, it is not very clear how the amount of a license can be ascertained at the beginning of a year, which is to be based upon the sales that are to be made during that year. Such however is the law, and it amounts to this practically that for 1884 the license will be graduated by the sales of 1883.

An assessment of a license tax is not required to be made by the officer, but it is the duty of him upon whom the law imposes the license to furnish a statement of his annual receipts as a basis for the graduation of it, and to apply for and obtain it.

We held in Mayor of Alexandria v. Heyman, 35 Ann. 301 and same plaintiff v. Williams, Ibid. 329, that suits for collection of taxes upon property were prohibited by the Constitution. This prohibition does not apply to the collection of licenses, and for an obvious reason. The mode of, or machinery for, collecting taxes upon property is by the sale of it, if after twenty days' notice payment is not made. A license could not be collected by the sale of an occupation, and it is upon an occupation that the license is imposed. For that reason doubtless a rule is authorized to be taken on motion against the party who has not obtained his license to shew cause why he shall not stop his business, Acts 1880, p. 152, and we see no reason why the rule should not also embrace the collection of the license, although it is not prescribed as the mode of collecting licenses, nor is it the only machinery that can be used.

The judgment was for only twenty dollars, the lower court thinking that grade of license the appropriate amount under the proof, or rather under the want of proof. The defendant appealed. There is no answer to the appeal—no prayer for the increase of the judgment, and we cannot therefore disturb it in the interest of the appellee.

Judgment affirmed.

No. 1114.

JOHN CHAFFE, ADM'R, vs. W. W. FARMER.

The issues arising under a provisional account filed by a former administrator, and the oppositions thereto are not identical with those presented by a suit for a final account brought against the former administrator, after his removal, by his successor in office. Even if they were identical, the former proceeding would only furnish ground for a plea of *lis pendens* in the latter suit, which could not be set up except *in limine*.

Chaffe vs. Farmer.

When an administrator has been removed, he owes to his successor in office an account of all funds and property which he had received for account of the succession. In an insolvent succession, he cannot in such account claim credit for debts of the succession paid by him on his own responsibility and without judicial order or authority. He was not vested with power to rank the creditors and distribute the succession funds. Such ranking and distribution can only be made by the court, after hearing to all the creditors upon proceedings according to law. He must pay over to the new administrator the funds received by him, for distribution according to law. And it is only upon such proceedings of distribution that he can assert his claim, contradictorily with all creditors, for reimbursement of the sums paid out by him in the extinguishment of succession debts, to the extent that the succession has been benefited by such payments.

APPEAL from the Fifth District Court, Parish of Ouachita. *Dinkgrave*, judge *ad hoc*.

C. J. Boatner and *M. J. Liddell* for Plaintiff and Appellee.

Talbot Stillman and *F. Garrett* for Defendant and Appellant.

The opinion of the Court was delivered by

FENNER, J. W. W. Farmer, the original administrator of the succession of Charles H. Morrison, was removed from his said office by final judgment of this Court in June, 1882. Thereafter, John Chaffe was duly appointed and confirmed as administrator of said succession. On January 15, 1883, he instituted the present suit against Farmer and, upon appropriate allegations, prayed that he be cited to appear and render a full and final account of his administration and after trial for judgment against him for whatever amount might be found due by him to the succession of Morrison.

On February 2, 1883, defendant joined issue by answer of general denial. Shortly afterwards he died. His testamentary executor, W. A. Collins, subsequently filed appearance as defendant, and on October 2, 1883, he filed an amended answer accompanied by a final account of Farmer's administration, which he prayed might be filed, and "that after proper proceedings and due hearing, the said account be fully homologated by final judgment in the premises."

The case was then set for trial on the 9th of October, but, owing to illness of defendant's counsel, was continued.

At the February term of 1884, the defendant, after having answered to the merits, after having filed his final account, and after having even actively prayed for a final judgment homologating it, presented the following plea to the jurisdiction of the court:

"W. A. Collins, testamentary executor of the estate of W. W. Farmer, deceased, respectfully shows: That this Honorable Court is without jurisdiction of this cause; that the succession of C. H. Morrison, so far

as W. W. Farmer's administration thereof is concerned, has by operation of law, the Constitution and orders of this court, been *transferred to the parish of Union*, where the provisional account of W. W. Farmer and his administrative acts and doings are *to be decided on and heard;* that the issues of this cause are a necessary part thereof and depend thereon. Appearer annexes all the orders and decrees relating hereto, which are shown by the minutes of court as pertaining hereto, and makes them a part thereof."

Reference to the orders and decrees mentioned exhibits the following facts: In the succession of Morrison, Farmer, prior to his removal, had filed a provisional account of his administration, to which sundry creditors had filed oppositions and to which, after Farmer's removal, Chaffe, administrator, also filed an opposition.

The issues arising on this provisional account and the oppositions thereto, had, on October 11, 1882, been ordered to be transferred to the District Court of Union Parish, on account of recusation of the judge of Ouachita, inability to find a qualified judge *ad hoc*, and failure of the judge of an adjoining district called to Ouachita to try the case, as provided in Act 40 of 1880. This order of transfer was made on the motion of Farmer. No actual transfer of the record took place, and this is shown to have been in consequence of agreement to that effect between Farmer and the counsel of Chaffe, administrator, both of whom preferred to avoid the trouble of going to Union parish and to have the issues between them adjusted in Ouachita if a qualified judge could be found, as is apparent from the proceedings in the instant case.

But leaving these things aside, it is clear that the issue presented on a provisional account, filed by Farmer while administrator, is not identical with that arising in an action against him, after his removal, by a succeeding administrator for a final account.

It is said, however, that Chaffe, administrator, engrafted the latter action upon his opposition to the provisional account. A reference to that opposition establishes the contrary; for it concludes with the words "reserving to this opponent the right to sue said Farmer for a final account and settlement thereof." Thus the right to bring the present suit not only was not confused in that proceeding, but was expressly excepted and reserved therefrom.

Even if it were admitted, however, that the relief demanded by Chaffe, ahministrator, in his opposition, was identical with that sought in this action, we are clear that the fact would give rise to nothing but a question of *lis pendens* of which defendant could only have availed

himself by pleading it *in limine litis*. This suit is brought before a court intrinsically competent to try it both *ratione materiæ* and *ratione personarum*. Indeed, if the suit could be brought at all, it could not be brought in any other tribunal, because it is that of defendant's personal and former official domicile. Although the district judge recused himself, a judge *ad hoc*, to whose qualifications no objection is made, was appointed under the provisions of Act 40 of 1880. There is no possible obstacle to his proceeding with the case, except the objection that a case involving the same issues between the same parties is pending undecided in the District Court of Union Parish. This is *lis pendens* and nothing more. It is of no consequence whether the suit originated in Union parish, or was transferred there. Its pendency is the only pertinent fact. If the parties are willing to stay or ignore that controversy, and to have their rights adjusted in a new suit before a different court, they have a perfect right to do so. They have, in the eye of the law, irrevocably consented to do so—plaintiff by bringing his suit, defendant by joining issue.

It is clear that the exception is unfounded, a mere after-thought conceived in the desire to delay the course of justice. and was properly overruled.

ON THE MERITS.

The account filed by the defendant shows that Farmer had received, in his capacity of administrator of Morrison's succession, in cash and bonds, the sum of fifty-seven thousand four hundred and sixty dollars and seventy-six cents ($57,460 76).

Against this, he sets up credits of various kinds, aggregating an amount far exceeding the sum received.

These credits fall within various categories.

1. The judge *ad hoc* allowed credit as claimed for expenses of administration, such as taxes, funeral charges, clerk's and sheriff's costs, expenses of sale, etc., amounting to $2679 16. He also allowed credit for certain bonds which had been returned to Chaffe, administrator, to the amount of $9679 54, and rejected all the other credits claimed, giving judgment in favor of plaintiff for $45,101 46, with five per cent interest from judicial demand.

2. A large portion of the remaining credits claimed consists of payments made by Farmer to various creditors of the succession, upon his own responsibility and without any order or authority of court. These credits were disallowed on the grounds that the succession was

insolvent; that its funds were the common pledge of its creditors and were bound to be distributed among them in the mode prescribed by law, according to their respective legal rights thereon, as judicially ascertained after due hearing in regular course of proceeding; that Farmer had no right to settle the rank of creditors and to make an *extra*-judicial distribution of the succession funds by paying particular debts; and that his right to claim reimbursement for payments so made to the extent that the succession has been benefited thereby, cannot be asserted in this suit, to which the creditors are not parties, but can only be set up contradictorily with those creditors when the administrator shall file his account and tableau of distribution.

The correctness of these grounds can hardly admit of dispute. If Farmer were still administrator, and this were his account rendered to the creditors in the succession proceeding, the propriety of the payments made by him, the rank of the creditors whose debts he has paid, and the extent to which such payments had extinguished debts, which, but for the payment, would have been entitled to share in the distribution, would have been questions properly arising and susceptible of determination; and to that extent he would have been entitled to credit.

But Farmer has ceased to be administrator. He has lost the capacity to make a distribution of the succession funds or to take proceedings for that purpose. The relations between him and the creditors of the succession have been sundered. A new administrator has been appointed, to whom alone Farmer is required to account. Farmer cannot set up these credits as against him, because his right to them cannot be settled contradictorily with him in absence of the creditors who are not, and cannot be made, parties to this suit.

Farmer's having disbursed the funds of the succession without authority of law, can furnish no lawful reason for not paying to the new administrator the amount of those funds which came into his hands.

They can only reach the creditors through proceedings for account and distribution to be taken by the new administrator. How can he distribute them until they are paid into his hands? When so paid, Farmer, in right of the creditors whose debts he has settled, and any other creditor, may require account and distribution, and if his just claims are not then allowed he may then, contradictorily with all other creditors, assert and vindicate his rights. But he cannot do it in this proceeding.

If it be a hard case that he should be required to pay over money, a large part of which he may ultimately be entitled to recover back, it is

the consequence of his own improvident and unlawful conduct. The law has very carefully prescribed rules for the administration of estates and for the conduct of administrators. When such officers neglect and violate these rules, they have no just cause of complaint if they bring trouble upon their own heads.

It is a very clear case that the creditors of this succession had and retain the right to have the funds of this succession distributed according to law. No one is authorized to make such distribution except the administrator. He must receive the funds before he can distribute them. Unless Farmer is made to pay them into his hands, they can never be distributed. *Ergo* defendant must pay over.

These conclusions flow so logically and necessarily from the rules of law governing the administration of successions, that they scarcely require the support of judicial authority which does not seem to have been brought to bear very directly upon them.

Nevertheless, the fundamental principles that the removed administrator can no longer make a distribution; that he owes his account, not directly to the creditors, but to his successor in office, and that the latter is the party to whom the creditors must look and with whom they must deal—were long since settled by this Court, Collins vs. Hollier, 13 Ann. 585.

2. This disposes of most of the credits claimed, including that for $7333 33, amount paid by Farmer as the purchase price of property, the sale of which was annulled by this Court in the case of Chaffe vs. Farmer, 34 Ann. 1017. Although that price was undoubtedly applied to payment of succession debts, yet, in that very case, it was held that Farmer must look for reimbursement to proceedings for the distribution of the price of the property when sold; and he must still be referred to that remedy.

We consider this item fully covered by the terms of the opposition, as well as by the decree above referred to. Under no circumstances could this claim be paid from the funds included in this account. It must look for satisfaction to the proceeds of sale of the property when distributed, as held in the case referred to.

3. There are various other credits claimed which are so untenable that we are at a loss how to treat them.

Thus defendant claims credits of nearly $25,000 for proceeds of crops raised on plantations belonging to the succession and which he claims were shipped to Chaffe's commission house in New Orleans, and proceeds of which are held by him or his house. We cannot see what this

has to do with the present account. If the cotton belonged to the succession, the account does not charge Farmer with its value. How then should it be credited with its proceeds? Chaffe, commission merchant, is not Chaffe, administrator. If the succession has claims against Chaffe, as an individual, this is not the place to enforce them.

Similar remarks apply to other credits claimed to stand in the name of Farmer, for account of the succession, on the books of Chaffe's commission house in New Orleans.

4. The claim of fees for services rendered by Farmer, as attorney, to himself as administrator, it is well settled cannot be allowed.

5. We find it impossible to reverse the clear ruling of the district judge rejecting the claim for commissions.

Certain amendments are claimed by appellee and other complaints are made by appellant; but after careful consideration we are satisfied the judgment appealed from has done substantial justice between the parties.

Both parties object to an absurd provision in the judgment, by which the judge *ad hoc* taxed himself a fee of $150 for his labor in hearing the cause. Of course the allowance is unwarranted by law and may be stricken from the judgment without affecting the question of costs of appeal.

It is, therefore, ordered that the tax of one hundred and fifty dollars "as compensation for the lawyer selected to try this case," be stricken from the judgment and that, with this change, the judgment appealed from be non-affirmed.

No. 1104.

C. H. Moore, Tutor, vs. John C. Stancel.

The admission of a husband that the purchase of property made in the name of his wife, is for her separate benefit, that the price was paid by her out of her individual funds, concludes him, though it may not his forced heirs or creditors.

Property acquired by the husband during the community, with his own funds, without stating in the act of purchase that the same is made for his personal advantage and that the same is paid out of his personal means, falls into the community, the husband remaining a creditor of the same for the amount invested.

Judgment cannot be rendered for a claim, in the absence of issue joined.

APPEAL from the Fifth District Court, Parish of Richland. *Richardson*, J.

H. P. Wells for Plaintiffs and Appellants.

T. O. Benton, contra.

The opinion of the Court was delivered by

BERMUDEZ, C. J. This suit was originally brought by a tutor for account of his ward, as sole heir of his mother. Its object is to recover from her surviving second husband, who is the minor's step-father, property claimed as her paraphernal estate; also, her interest in three other pieces averred to be community property; besides, the fruits of both, and finally, a partition of the common assets.

On becoming of age, shortly after suit, the ward entered appearance and formally made himself the party plaintiff.

In the petition which he filed to that end, he reiterated the averments and prayers of previous petitions and sought a money judgment for several amounts aggregating some $8000, and stated to be due his mother by her surviving husband.

The defense is a denial of all the advanced pretensions, an averment that all the property belongs to the husband, as having been acquired out of his separate funds; that if the first piece be declared to be the paraphernal property of the wife, and the other pieces, community property, they are respectively chargeable with various amounts expended in different ways, which it is unnecessary to mention, and that judgment should be accordingly rendered in his favor.

Before judgment, the surviving husband, made defendant, having died, his executor made himself a party in his place.

There was judgment recognizing that the property claimed as paraphernal and known as the "*Home*" place, is such; allowing an annual rent thereof at $300 from July, 1879, the death of the wife; declaring the other pieces of property known as the Coke and Coleman places, and the undivided half of the Sicily Island property, as community property; decreeing a partition thereof and allowing to defendant $1211 93 with legal interest from August 20, 1883.

From this judgment both parties obtained an appeal, which was perfected only by the plaintiff. The defendant, however, has, in this Court, prayed for a reversal or amendment of the judgment, so as to recover as claimed in his answer and reconventional demand.

MERITS.

We will proceed to consider the merits of this controversy.

It is proper to note, at the threshold, that John Jenkins, who is the plaintiff, sues as the only issue of his mother by her first marriage. In fact, there was no issue from her subsequent marriage with J. C. Stancel, who, himself, left no forced heir.

So that, the Act of 1884, now Article 915, R. C. C., which allows to the survivor, the usufruct of the share of the deceased spouse in the community property, is no factor and finds no application in this controversy, and consequently, plaintiff is entitled to claim and recover, on proof, the interest of his mother in that community.

The material facts gathered from the voluminous record are the following:

On October 3, 1870, the real estate claimed as the paraphernal property of the plaintiff's mother and which is known as the *"Home"* place, was acquired by her with the authority of her husband. The act declares, that the price $3500 is paid by her out of moneys claimed by her as her paraphernal funds, under her separate control and administration, recently inherited by her in Alabama, and of which her husband never had the control. The act is signed by her and by her husband.

The three other pieces of property already indicated by the names given them, were acquired by the husband during the marriage. The acts do not set forth that the purchases are made by the husband with the intention of making the property exclusively his and that the price is paid out of his individual funds.

There is evidence that prior to his leaving Alabama, where he once resided, the defendant owned considerable property which was sold subsequent to his removal, in 1869, to Louisiana, to which he had, the year previous, sent his wife.

It is not fully established how he disposed of all his individual funds, but it is sufficiently shown that part of the same was actually used for the purchase of some of the real estate claimed as comprising the mass of the community and that the lower court gave him credit for the amount which it found had been thus used.

It also appears that Mrs. —— Stancel owned some property in Alabama, that after her removal to Louisiana, she returned to her former home and came back, bringing with her, in currency and coin, upwards of $3400.

The evidence which is, in that respect, circumstantial and scattering, shows that, at different times, her husband has received for her account, various amounts said to aggregate some six thousand dollars, both in Alabama and in this State.

It is also shown that the wife and her husband had as their agent, W. G. Little, of Alabama.

The record also discloses other facts which are not deemed material for the determination of this suit.

The only questions presented are the following:

1. Whether the "*Home*" place is the paraphernal property of Mrs. Stancel?

2. Whether the other pieces of real estate are community property or the husband's individual property?

3. Whether the plaintiff is entitled to recover the amounts alleged to have been received by the husband for account of his wife?

4. What is the amount to which the defendant is entitled, as as much invested and disbursed, under his answer and reconventional demand?

We will proceed to examine those questions in their respective order.

I.

The tenor of the act of sale of the "*Home*" place to Mrs. Stancel, explicitly shows that the purchase was made in her name, with her funds inherited from her parents in Alabama, and for her separate advantage. The correctness of those facts is indelibly admitted by the husband who authorized her in the premises and signed the deed in person.

This acknowledgment was conclusive upon him, though it would not be on its face against his creditors or his forced heirs, had he left any, which he did not. 35 Ann. 33; 34 Ann. 375; 33 Ann. 688; 31 Ann. 124; 30 Ann. 1036; 21 Ann. 343; 16 Ann. 271; 9 Ann. 242, etc.

If it be true that defendant could be relieved from the effect of such admission, this could only be in a proper case, on a proper averment and proof, by setting up and showing error, fraud, violence, or some vitiating defense, which was not done.

The only attempt made was to show by a letter of Mrs. Stancel to her brother and agent that she acknowledged having asked one thousand dollars of her husband's money to make the purchase and of which she directed the return.

Objection was made to the introduction of this letter, but it was overruled and a bill reserved. The letter was received, but the district judge attached no importance or weight to it.

The objection went to the effect and not to the admissibility of this written evidence. It could prove and proved nothing to justify the claim of the defendant to the ownership of the property.

There is no evidence to support the statement in the letter, which, if it proves anything in the sense of ownership, establishes that the property was purchased by Mrs. Stancel for her separate benefit.

If it could prove an indebtedness by the wife in favor of the husband, the presumption is, under the evidence, that it was settled subsequent-

ly, in 1875, when a final settlement took place between the defendant and Little, as the agent of both, his wife and himself.

But however important the acknowledgment by the wife may have been, the letter is not a counter letter. It does not purport to be an admission on her part that though the title be in her name the property is not hers but belongs to her husband. At best, it would amount to nothing more than the evidence of an indebtedness. The investment of the latter's money, without his knowledge, without her consent, without a recital to that end in the act which would have put the property at his risk, could, under no circumstance, make the husband sole owner or even co-proprietor of it.

If proof were necessary, as to the husband, (where no forced heir or creditor exists,) it might be said that the evidence in the record shows that Mrs. Stancel, after moving to Louisiana, had funds sufficient, by a few tens, to make the purchase, so that there can be no doubt that the "*Home*" place, from either aspect, was correctly decided to be the paraphernal property of the plaintiff's mother.

Such being the case, title to it has vested, at her death, in her only heir, who, as such, has a right to the fruits of the same, from that time to that of delivery.

II.

The other pieces of property were purchased during the marriage. Conceding that the price of two of them was paid in part out of the individual funds of the husband, this was not sufficient to make them his separate estate. He should have clearly established his intention at the time by declaration in the act and mentioned the fact of the payment out of his individual assets and been ready, eventually, to establish that last fact, contradictorily with the heirs of his wife. The jurisprudence on that subject is so firmly established that a reference to all the authorities would be cumbersome. However, see 14 Ann. 618; Joffrion vs. Bordelon, Bars vs. Lynch, 7 Ann. 104; Young's case, 5 Ann. 611, and H. D. 883 and 884, where numerous authorities are collected.

III.

The last matter to be considered is whether the plaintiff is entitled to recover the amounts claimed by him as received, by defendant, for account of his mother.

It is unnecessary to review the evidence on the subject, for the reason that the question is not presented by the pleadings.

Those amounts are not claimed in the original petition. The petitions subsequently filed, were designed to correct a description of prop-

erty and to make Jenkins a party. No importance can be attached to the circumstance that, in the last proceeding, Jenkins prayed for a judgment of $8000.

That petition was not permitted to be filed and not put at issue by any answer of the defendant. This was essentially necessary. C. P. 359. So that the matter is not involved in this controversy.

The district judge, for a reason somewhat similar, declined to allow the demand to any extent. The judgment rendered merely passed on matters *at issue* and left this claim unaffected, so that the right to assert and enforce it, if it exists, continues in the plaintiff.

IV.

In relation to the claims and counter claims of the defendant, we can only state that an examination of the evidence does not enable us to say that the judgment of the lower court, which allows him $1211 93, does not do him justice.

Our learned and industrious brother, the district judge, has evidently taken unusual pains, as appears from his elaborate and exhaustive opinion, to recapitulate, analyze and, as far as practicable, to reduce to form and substance, and more certainty, the almost interminable, confused, circumstantial, shapeless and unsatisfactory evidence adduced in the case. We have patiently followed him in his extensive investigations and have carefully weighed the criticism directed against his conclusions, and we remain convinced that in deciding as he has done, he has not only applied the whole law, but exerted his equity powers in favor of the defendant, who has shown no just cause of complaint and therefore should be satisfied.

Judgment affirmed.

No. 1105.

JOHN CHAFFE & SONS VS. MARGARET E. MCINTOSH ET AL.

When the Supreme Court was not in session on the return day for appeals nor for several days thereafter, in consequence of the inability of the judges to reach the seat of the court, and the court was opened by the clerk and adjourned from day to day, an appeal filed on the day the court first sits will be in time.

Where a community of acquets exists between husband and wife, and the husband cultivates a plantation that belongs to the wife, the debts incurred by such cultivation are the husband's and cannot be enforced against the wife's property.

Even though the wife has signed lien contracts in favour of a factor for supplies and advances, if the fact be that she has not the administration of her separate property, but the husband does administer it as head of the community, he alone is responsible for the supplies and advances.

And if the debt that is contracted is put in the form of a note which is signed by the husband and wife, she will not be bound thereby.

APPEAL from the Fifth District Court, Parish of Richland. *Richardson*, J.

Wells & Williams for Plaintiffs and Appellees.

Potts & Hudson for Defendants and Appellants.

On Motion to Dismiss.

The opinion of the Court was delivered by

MANNING, J. The motion for dismissal is based on the alleged failure to file the transcript in time. The return day is Monday, June 2d. The court was not in session on that day, nor until Saturday the 7th.—this last being the earliest day the Judges could reach Monroe after holding court at New Orleans on the last day of May, as they are required to do by the Constitution. The court had been opened on the 2d. by the clerk, and was adjourned from day to day until the 7th., when we arrived and sat, and on that day the transcript was filed. It is in time.

The sole provision for this contingency is in an Act of 1870, whereby it is permitted to an appellant, if this Court is not in session on the day fixed for the return of any case, to file his record within three judicial days at the first session of the Supreme Court thereafter. Acts 1870, p. 100. Literally this merely permits him to bring his appeal up to the next term, which in this case would be next summer, but obviously the meaning and intent was also to permit the filing of the record within three judicial days after the Court shall be in session at that term, and thus construed, this appeal is saved.

The motion is refused.

On the Merits.

Margaret McIntosh owned three plantations, having inherited them. Her husband cultivated one of them upon which they lived. He let the others. The community of acquets existed between them, and he managed and controlled the property in the usual way in which husbands do. The Chaffes were the commission merchants or factors, through or from whom advances and supplies were obtained. In process of time a debt was created which amounted on May 16, 1877 to three thousand and eighty-six $\frac{63}{100}$ dollars, and for it three notes were executed by the husband and wife, the notes each reading "I promise to

pay," and being signed by the husband and underneath his signature is that of his wife.

This suit is upon those notes and judgment is asked against each of them for the full amount.

Mrs. McIntosh denies liability. Her husband alleges that the sum claimed is in excess of his real indebtedness under any circumstances, and recites sundry shipments of produce, payments, excessive charges, etc. which not only wipe out the debt sued on, but turn the balance in his favour, and for such balance he reconvenes. His defence may be dismissed with the observation that all the transactions set out by him took place before they were closed by the execution of the notes, and that it is too late for him to reopen business, all the details of which were as well known to him then as now, and to make a statement of accounts from his standpoint which he could have done before signing the notes, if there was error in the statement presented to him by the plaintiffs. It is not pretended there was fraud or deceit practiced on him. There were charges that he willingly submitted to then, and he cannot get relief against them now. The judgment against him was for the full amount of the notes.

The wife's defence prevailed and properly. It is settled law that the debts contracted during the marriage, when community exists, are the debts of the husband alone. Mr. McIntosh owned no property at the time of his marriage. The fruits and revenues of his wife's property belonged to the community, of which he was the head and master, and the debts incurred in producing those revenues are the debts of him who has the power and the right to dispose of the revenues. Fluke v. Martin, 26 Ann. 279; Van Wickle v. Violet, 30 Ann. 1106; Smith v. White, 32 Ann. 1033.

It is a matter of no consequence how the plaintiffs kept their accounts —whether the name of Mrs. McIntosh was at the head of their ledger or of her husband or both. Her liability is in no manner affected by the circumstance that, while dealing with her husband, they chose to make the semblance of dealing with her. But in fact the accounts were kept in his name alone until trouble loomed, when a change was made. The attempt to bind her by procuring her signature to the notes is equally futile. As the debt was the husband's, she could not assume it and her signature was nothing worth. Graham v. Thayer, 29 Ann. 75; Hall v. Wyche, 31 Ann. 734.

No portion of the debt sued on is for permanent improvements on the plantations, and no part thereof enured to the benefit of the wife sepa-

rately or of her separate property. The debt was created in the ordinary routine of plantation cultivation, and comprises nothing but advances and supplies, and the various and numerous charges with which such accounts are usually swelled, which however illegal in the outset were condoned by Mr. McIntosh when he voluntarily and knowingly submitted to them by executing his note for the sum total including them.

The fact that Mrs. McIntosh signed the lien contracts for supplies does not make the cultivation of the plantation a business of hers. By signing those contracts she was simply interfering needlessly and superfluously with her husband's business, and her act does not change her legal status. Her immunity from legal obligation is the result and consequence of certain legal principles which our law and jurisprudence have formulated for the regulation of the business relations of spouses to each other and to the outside world, and when the plaintiffs dealt with them or either of them without advising themselves of the safeguards that the law throws around the wife and of the obligations it imposes upon the husband, when a community of property exists between them, they have themselves only to blame for stepping into pitfalls that have all along been pointed out by successive decisions of this Court.

Judgment affirmed.